Supreme Court, U.S.
FILED
NOV 7 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-359

In The
Supreme Court of the United States
October Term, 1985

—o—

COUNTY OF WAYNE and WILLIAM LUCAS,
Petitioners,

vs.

SALVATORE MARCHESE,
Respondent.

—o—

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

—o—

PETITIONERS' REPLY BRIEF

—o—

JOHN D. O'HAIR
Wayne County Corporation Counsel

GLEN HOWARD DOWNS
Assistant Corporation Counsel
701 City-County Building
Detroit, Michigan 48226
Phone: (313) 224-5030

Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

BEST AVAILABLE COPY

TABLE OF CONTENTS

Pages

TABLE OF AUTHORITIES ii

PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION 1

I. This Case Is Properly Reviewable Under the Isolated Incident Rule. 2

II. Fed. R. Civ. P. 51 Does Not Bar This Court's Review Under The Isolated Incident Rule. 3

III. Additional Authority For Granting The Writ Since The Petition For A Writ Of Certiorari Was Filed. 6

CONCLUSION AND RELIEF REQUESTED 7

TABLE OF AUTHORITIES

Page

CASES:

City of Lawton v. Lusby, 54 U.S.L.W. 3190 & 3221 (U.S. Oct. 8, 1985) (No. 84-1715) 6

City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 101 S.Ct. 2748, 69 L.Ed.2d 616 (1981) 6

City of Shepardsville v. Rymer, 53 U.S.L.W. 3903 (U.S. July 1, 1985) (No. 84-1756) 4

Lusby v. T.G. & Y. Stores, Inc., 749 F.2d 1423 (10th Cir. 1984) 6

Monell v. Department of Social Services, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) 3, 7

Oklahoma City v. Tuttle, — U.S. —, 105 S.Ct. 2427, 85 L.Ed.2d 791 (1985) 2, 3, 7

Rymer v. Davis, 754 F.2d 198 (6th Cir. 1985) 4

STATUTES AND RULES:

Fed. R. Civ. P. 51 ..... 3, 4, 6

42 U.S.C. § 1983 ..... 2, 4, 6, 7

No. 85-359

—o—

In The
Supreme Court of the United States
October Term, 1985

—o—

COUNTY OF WAYNE and WILLIAM LUCAS,
Petitioners,

vs.

SALVATORE MARCHESE,
Respondent.

—o—

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

—o—

PETITIONERS' REPLY BRIEF

—o—

Some things in the Respondent's Brief in Opposition invite a reply—like the argumentative account of the evidence, a good part of which ranges between hyperbole and worse. But we will take that up later, if need be, and confine our reply here to Respondent's insistence that our first two Questions Presented for Review unjustifiably rely on what has been styled the single or isolated incident rule (Pet. for Cert. 11-12 & n. 3): i.e., the principle affirmed

by this Court in *Oklahoma City v. Tuttle*, — U.S. —, 105 S.Ct. 2427, 85 L.Ed. 2d 791 (1985) and by the vast majority of the Circuit Courts of Appeals that an "official policy" sufficient to impose official or governmental liability under 42 U.S.C. § 1983 cannot be proved inferentially on proof of a single or isolated incident of unconstitutional conduct.

I. This Case Is Properly Reviewable Under The Isolated Incident Rule.

The Respondent first argues the irrelevance here of the isolated incident rule, asserting that the assaults by sheriff's deputies were neither a single nor an isolated incident. During the hours immediately following his arrest, "[Respondent] was *twice* beaten severely * * * *" Respondent says (Resp.Br. 2) (emphasis Respondent's), and "[n]either beating * * * was isolated. To the contrary, they were thoroughly orchestrated events carried out with the approval of supervisory, commanding officers [at the suburban Detroit road patrol station] * * * *" (Resp.Br. 6)

Respondent persists in confounding his theory for the individual officers' liability (all of whom were either nonparties or exonerated at trial, Pet. for Cert. 5) with the requirements for establishing the Petitioners' liability on proof of their underlying "policy". This Court held in *Tuttle*, 105 S.Ct. at 2436, that "the word 'policy' generally implies a course of action consciously chosen from among various alternatives". The single incident rule embodies the commonplace that one instance of unconstitutional conduct against one person does not imply either that it was "consciously chosen" by municipal policymakers, or that it is part of a "course of action". Accordingly, the Re-

spondent's evidence of the circumstances surrounding only his post-arrest mistreatment on this one occasion would be sufficient (if believed) as against the officers individually; but neither in logic nor at law would that evidence suffice to prove the existence of any underlying official policy.

Therefore, under *Tuttle,* and with regard to the Petitioners' alleged and presumptively unconstitutional policy of condoning prisoner abuse by neither investigating it nor sanctioning those who commit it, evidence that only Respondent had been so abused during the brief time following his arrest, together with a silent record on whether an investigation or disciplinary action ensued, "is not sufficient to impose liability under *Monell* [because under the single incident rule] proof of the incident [does not include] proof that it was caused by an existing, unconstitutional municipal policy, which policy can be attributed to a municipal policymaker." *Tuttle,* 105 S.Ct. at 2436. As for the alleged policies of inappropriate training and discipline of police officers which perhaps would not be facially unconstitutional, the record does not disclose (as the Court of Appeals' opinion indicates) "considerably more proof than the single incident * * * to establish both the requisite fault * * * and the causal connection between the 'policy' and the constitutional deprivation." *Tuttle,* 105 S.Ct. at 2436.

II. Fed. R. Civ. P. 51 Does Not Bar This Court's Review Under The Isolated Incident Rule.

The Respondent's second argument on the isolated incident rule is that we did not raise the issue "until filing [our] Petition for a Writ of Certiorari" with this Court,

(Resp.Br. 11) and that we have therefore waived our right to a review of that issue under Fed. R. Civ. P. 51.

With regard to the "official policies" in our first two Questions Presented for Review, we respectfully point out that neither was ever amenable to review through a Rule 51 objection because neither of them appeared in the case until the Respondent's brief on appeal. They then became the Court of Appeals' theories for upholding the Petitioners' liability. We did challenge those policies at the earliest opportunity, which was when we submitted our Response Brief and, later, our Petition for Rehearing En Banc in the Court of Appeals.

We intimated in our Petition for a Writ of Certiorari that the Sixth Circuit used this case as the sequel to *Rymer v. Davis*, 754 F.2d 198 (6th Cir. 1985) *vacated and remanded sub nom City of Shepardsville v. Rymer*, 53 U.S.L.W. 3903 (U.S. July 1, 1985) (No. 84-1756) (Pet. for Cert. 10) perhaps with a view to establishing in the Sixth Circuit that either a "policy" or "custom" for 42 U.S.C. § 1983 purposes may be established by proof of a single incident of unconstitutional conduct. At any rate, the Petitioners could hardly anticipate at the district court instruction conference that this case would be used by the court on appeal to forge policy on issues not pursued at trial.

As for the presence of the isolated incident issue in the other contexts, we will stand by our statement in our Petition (Pet. for Cert. 11) that the issue has been in the case throughout. In addition to the instruction (Pet. for Cert. 11), it appears in all parties' appellate briefs in the

Sixth Circuit[1] and again, as mentioned earlier, in our Petition for Rehearing En Banc[2]. It was briefed on the merits in the Respondent's Response in Opposition to Appellants' Petition for Rehearing[3], and decided on the merits by the

---

[1] Petitioners as appellants in the Court of Appeals argued that "there is a total absence of any testimony that would indicate what type of training would be necessary or relevant to ensure that an *isolated instance of alleged police brutality* did not occur". (emphasis added) (Appellants' Brief 18).

Respondent as appellee countered that "in Rizzo v. Goode * * * the court held that authorization and approval on the part of supervisory officials could be found when such an official failed to act or acted inadequately when he had actual or imputed knowledge of well-known, *isolated incidents of misconduct.*" (emphasis added) (Appellee Brief 17-18). Again: "this incident can be considered a *single, unusually brutal beating* which warrants the inference that it was attributable to inadequate training or supervision" (emphasis added) (Appellee Brief 19).

Appellants' reply brief answered: "[Appellee's] reliance upon the *single unusually brutal beating concept,* as espoused in [Turpin v. Mailet, 619 F.2d 196 (2d Cir. 1980)] is also not applicable in this instance." (emphasis added) (Response Brief 17).

[2] The second question presented in the Petition for Rehearing En Banc was "(2) whether this Circuit shall be alone among the federal judicial circuits in holding that the requisite 'policy or custom' for predicating municipal liability under 42 U.S.C. § 1983 for official misconduct may be proved solely by inference from an *isolated incident of misconduct.*" (emphasis added) (Pet. for Rehearing 2).

[3] Respondent's Response in Opposition to Appellants' Petition for Rehearing argued as its second main point: "Defendants-Appellants' Argument With Regard to Inferences Drawn From an *Isolated Incident Of Unconstitutional Conduct* Is Inapplicable With Regard To This Matter". (emphasis added).

Court of Appeals.[4] Thus, it would seem more apropos to consider Respondent's argument under this Court's rule in *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 257, 101 S.Ct. 2748, 2754-2755, 69 L.Ed.2d 616 (1981), where the defendant municipality in a 42 U.S.C. § 1983 action failed to timely object under Rule 51 to the punitive damages instruction it challenged in this Court:

> "[the] question is important and appears likely to recur in § 1983 litigation against municipalities. And here the question was squarely presented and decided on a complete trial record by the court of first resort, was argued by both sides to the Court of Appeals, and has been fully briefed before this Court. In light of all these factors, we conclude that restricting our review . . . would serve neither to promote the interests of justice nor to advance efficient judicial administration. We therefore turn to the merits of petitioner's claim."

III. Additional Authority For Granting The Writ Since The Petition For A Writ Of Certiorari Was Filed.

Apropos to the importance and recurrence of the isolated incident rule in keeping § 1983 litigation within the bounds established by this Court, the Petitioners respectfully direct the Court's attention to its recent disposition of *Lusby v. T.G. & Y. Stores, Inc.*, 749 F.2d 1423 (10th Cir. 1984) *vacated and remanded sub. nom City of Lawton v. Lusby*, 54 U.S.L.W. 3190 & 3221 (U.S. Oct. 8, 1985) (No.

---

[4] The Court of Appeals' Order Denying our Petition for Rehearing En Banc, set out in the Appendix to our Petition (App. 21a) recites: "The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case as amended below."

84-1715), which presented the questions (1) whether a single or isolated incident of misconduct will suffice to establish a municipality's liability under 42 U.S.C. § 1983 on an "official policy", and (2) whether an appellate court's affirming a municipality's liability on the *court's* finding an official policy of failing to investigate comports with the liability standards established in *Monell v. Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).

CONCLUSION AND RELIEF REQUESTED

For the reasons stated both in this Reply and in our Petition for a Writ of Certiorari, the Petitioners respectfully request this Court to issue its writ of certiorari to the Court of Appeals for the Sixth Circuit and thereupon reverse the judgment entered herein, or alternatively, summarily vacate the judgment and remand this case for reconsideration under the principles affirmed in *Oklahoma City v. Tuttle*.

Respectfully submitted,

JOHN D. O'HAIR
Wayne County Corporation Counsel

GLEN HOWARD DOWNS
Assistant Corporation Counsel
701 City-County Building
Detroit, Michigan 48226
Phone: (313) 224-5030

Counsel for Petitioners

Dated November 6, 1985.